

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BUNN ENTERPRISES, INC.,	.	
et al.,	.	
	.	
PLAINTIFFS.	.	CASE NO. 2:13-CV-357
	.	
vs.	.	COLUMBUS, OHIO
	.	MAY 3, 2013
OHIO OPERATING ENGINEERS	.	8:00 A.M.
FRINGE BENEFIT PROGRAMS,	.	
	.	
DEFENDANT.	.	
.	

VOLUME II

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	RONALD L. MASON, ESQ.
	AARON TULENCIK, ESQ.

FOR THE DEFENDANT:	BRYAN C. BARCH, ESQ.
	DANIEL J. CLARK, ESQ.

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FRIDAY MORNING SESSION

MAY 3, 2013

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THE COURT: Good morning.

Ms. Glenn, would you resume the stand? Please be seated.

Mr. Mason.

MR. MASON: Your Honor, we have no further questions.

THE COURT: Mr. Clark, any redirect?

MR. CLARK: I believe just one.

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REDIRECT EXAMINATION

BY MR. CLARK:

Q Ms. Glenn, could you return to the document marked Defendant's Exhibit 2?

A Mark Morgan?

Q Yes.

A Yes.

Q Looking at the first page of Exhibit 2 on the right side of the top half of the document there is some handwritten notes.

A Yes.

Q Can you identify those notes?

A Those are notes that I took after reviewing the audit

1 reports, the unpaid audit finding hours for Mark Morgan.
2 June 2012 through November 2012, the hours listed by those
3 dates are the hours that have yet to be credited to his
4 account.

5 Q Are those the hours that you considered when
6 evaluating whether Mr. Morgan would be eligible for health
7 and welfare benefits after January 31st of 2013 with the
8 Bunn Enterprises' hours included?

9 A Yes, they are.

10 MR. CLARK: I have no additional questions, Your
11 Honor. Thank you.

12 THE COURT: Thank you, Mr. Clark.

13 Ms. Glenn, thank you very much, ma'am. You may be
14 excused.

15 MR. MASON: Your Honor, if I could, just one
16 question, too?

17 THE COURT: I'm sorry. Sure.

18 One last question.

19 - - -

20 RECROSS-EXAMINATION

21 BY MR. MASON:

22 Q What was the total hours that Mr. Morgan worked in the
23 year of 2012 from the beginning of the time period, I guess
24 April through the end of November? What was the total
25 hours?

1 A April through the end of November?

2 Q Yes. You know, for the year 2012.

3 A Well, not having a pen, it's -- they're all written
4 here, but I can't --

5 Q Isn't it a fact there are over 900 hours that he
6 worked in that time frame?

7 A There may be, but even if there are, his eligibility
8 would still not extend past January, in accordance to our
9 eligibility rules.

10 MR. MASON: That's all the questions I have.

11 THE COURT: Thank you. Thank you, ma'am. You may
12 be excused.

13 Mr. Clark, your next witness.

14 MR. CLARK: Our next witness is Carol Wilson.

15 THE COURT: Ms. Wilson, please come forward and be
16 sworn.

17 (Witness sworn.)

18 THE COURT: Ms. Wilson, bend the microphone toward
19 you and speak clearly into it, please.

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CAROL WILSON

Called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CLARK:

Q Could you state your name for the record, please?

A Carol Lanette Wilson.

Q And are you currently employed, Ms. Wilson?

A Yes, I am.

Q And where are you employed?

A With the Ohio Operating Engineers Fringe Benefit Programs.

Q What is your job title with the fringe benefit programs?

A Assistant administrator.

Q When we use the term Ohio Operating Engineers Fringe Benefit Programs, is there a legal entity with that name?

A No, there is not. It is comprised of four Taft-Hartley Trust Funds of which they include the Ohio Operating Engineers Health and Welfare Plan, the Ohio Operating Engineers Pension Fund, the Ohio Operating Engineers Apprenticeship and Training Fund, and the Ohio Operating Engineers Education and Safety Fund.

Q And do each of the four funds share trustees?

1 A No, they do not.

2 Q Who are the trustees -- not by name, but where do the
3 trustees come from for the fringe benefit fund?

4 A Half of the trustees are labor trustees and the other
5 half are from management, which are contractor trustees.
6 There is an equal number of labor and management.

7 Q Could you take a look at the exhibits to your right
8 and direct your attention towards the document marked
9 Defendant's Exhibit 1?

10 A Okay.

11 Q What is Defendant's Exhibit 1?

12 A This is the Ohio Operating Engineers Health and
13 Welfare Plan plan document.

14 Q Does the plan document address the appeal process that
15 a member of the health and welfare fund would use for
16 appealing eligibility determination?

17 A Yes, it does.

18 Q Can you identify the portion of the plan document that
19 addresses that?

20 A It's on page 44 under "I" at the bottom, Appeals of
21 Eligibility Determinations.

22 Q We've also heard the term SPD. What is an SPD?

23 A This is a summary plan description.

24 Q What is a summary plan description?

25 A It is more of a layman's -- puts into layman's term

1 the plan for the members. And that is distributed to all
2 of the members. We actually did a mailing in late 2011 to
3 all participants. And that is also given to any new
4 members who become initially eligible under the plan. And
5 if we would have a member who has been without coverage for
6 more than 12 months and then they reestablish their
7 eligibility, they would then receive another summary plan
8 description.

9 Q Ms. Wilson, you've been handed a two-page document
10 marked Defendant's Exhibit 6. Can you identify the first
11 page of Exhibit 6?

12 A This is the cover of the current summary plan
13 description.

14 Q Can you identify page two of Exhibit 6, please?

15 A Yes. That is the page which includes the appeals of
16 eligibility determinations.

17 Q To your knowledge, have any of the plaintiffs in this
18 case appealed an eligibility determination of the fund --

19 A Not to my --

20 Q -- pursuant to this procedure described in the SPD?

21 A Not to my knowledge.

22 Q Ms. Wilson, we've also heard some testimony yesterday
23 regarding the crediting of contributions that are received
24 from an employer when there is a delinquency on that
25 employer's account. Can you explain the practice of the

1 fringe benefit fund office and how those contributions are
2 credited?

3 A Yes. There is a fund office policy of applying
4 payments to the oldest outstanding balance when there has
5 been an audit that results in delinquencies. And that
6 predates my time with the office. I think it goes back to
7 the beginning of each of these trust funds. They've
8 administered the plan like that from day one, and it is
9 administered to all contractors the same way.

10 Q How long have you been with the fringe benefit funds?

11 A Twenty-eight years.

12 Q What is the reason or the rationale behind the
13 practice of crediting contributions towards the oldest
14 delinquency?

15 A Well, there needs to be a uniform rule that applies to
16 all contractors where we cannot ignore an older liability
17 in order to pay a more recent one. We can't pick and
18 choose who we're giving credit to. So, in that case, we
19 would apply any payments that come in, once there has been
20 an audit resulting in delinquencies, and that money would
21 first be applied to the oldest balance and carry forward.

22 THE COURT: Ms. Wilson, what rules require you to
23 allow payments to be made in that manner, or I should say
24 what rules require you to make payments in that manner?

25 THE WITNESS: Well, I believe it's the trustees'

1 fiduciary responsibility under ERISA that this policy has
2 been implemented.

3 THE COURT: Is there a particular section of the
4 code to which you refer, or upon which you rely in making
5 the determination to credit certain payments to delinquent
6 accounts as opposed to the current employee?

7 THE WITNESS: I do not know specifically where it
8 would be.

9 THE COURT: That's just the way that you do it?

10 THE WITNESS: Yes.

11 THE COURT: Did anyone tell you that you were
12 required to do it that way?

13 THE WITNESS: When I was first hired, that was what
14 was taught to me. That was the practice. So we've
15 continued that on since I've been there.

16 THE COURT: Okay. Please continue, Mr. Clark.

17 MR. CLARK: Thank you, Your Honor.

18 BY MR. CLARK:

19 Q Ms. Wilson, has that practice been utilized with every
20 delinquent employer?

21 A Yes.

22 MR. CLARK: I have no additional, Your Honor.

23 THE COURT: Thank you, Mr. Clark.

24 Mr. Mason.
25

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CROSS-EXAMINATION

BY MR. MASON:

Q How long have you worked with the fund?

A Twenty-eight years.

Q Twenty-eight years. And in this 28 years, you say this policy, procedure, that you have of allocating funds to the oldest balance due has been even before your presence, right?

A That's correct.

Q And that this is a policy that you believe is appropriate and that should be applied uniformly to all companies, correct?

A Yes.

Q Therefore, I have a real simple question. With respect to these individuals who you're asserting did not exhaust their administrative remedies by filing with you, seeking to have credit to deviate from a policy that has been in effect for more than 28 years, isn't it a fact that their exhaustion of administrative remedies would have been futile because of your policy you're seeking to uniformly enforce for the past 28 years?

THE COURT: Would you repeat that question back, Mrs. Evans?

(Thereupon, the last question was read by the court

1 reporter.)

2 THE COURT: Do you understand the question,
3 Ms. Wilson?

4 MR. WILSON: I do. But I don't think I can answer
5 that question. They certainly have the right to appeal.

6 THE COURT: Please continue, Mr. Mason.

7 BY MR. MASON:

8 Q As a matter of fact, I believe we've got a lot of
9 cases where the operating engineers have sought to defend a
10 position that the all-hours worked should be charged to the
11 companies for many years. Is it your position that in all
12 that litigation that you have done to defend a policy that
13 has been challenged sometimes successfully, that these
14 gentlemen, by filing an appeal when you're trying to take
15 their money to apply to a balance that you claim is owed,
16 that they would have any chance in your administrative
17 process to get what you guys have been litigating for years
18 and holding and even we're here today fighting over, that
19 they would have an administrative process, an ability to
20 actually get a decision that would be different than the
21 position that you're taking in this litigation?

22 MR. CLARK: Objection, Your Honor.

23 THE COURT: I'm going to sustain it as to form of
24 the question. It was compound multiple times. So I'm
25 going to have Mrs. Evans read the question back so that you

1 can capture the essence of what you were asking and break
2 it down into its parts.

3 Mrs. Evans would you read that question back,
4 please?

5 (Thereupon, the last question was read by the court
6 reporter.)

7 MR. MASON: I will break that down, Your Honor.

8 BY MR. MASON:

9 Q Are you aware of the fact that the operating engineers
10 has been involved in numerous lawsuits involving hours
11 worked?

12 A Yes.

13 Q Are you aware of the fact that the operating engineers
14 has taken the position on a number of cases that all hours
15 worked, regardless of whether or not it's covered under the
16 collective bargaining agreement, should be charged to the
17 company?

18 A Can you rephrase that? I don't understand.

19 Q Are you aware that the position that the operating
20 engineers funds was taking was that regardless of whether
21 it was work under the collective bargaining agreement, if
22 they worked hours, the fund had a right to the proceeds,
23 the fringe benefits?

24 A Specifically, I can't answer that.

25 Q Are you aware of the facts in this litigation with

1 respect to the claims that Bunn has been making?

2 A I believe so.

3 Q And as a matter of fact, Mr. Bunn I believe himself
4 has actually called you regarding this matter, right?

5 A I think I spoke to him one time.

6 Q Have you spoke to any of these other individual
7 employees with respect to their individual claim?

8 A Not to my knowledge.

9 Q And in that, you understood the position of Bunn was
10 that they didn't owe this money and that they should not be
11 getting charged and that these men should be getting
12 credit?

13 A I understood Mr. Bunn's position.

14 Q And when he made that position, did you change your
15 mind that, oh, we've made a mistake here and we should not
16 be charging Bunn?

17 A No, I didn't change my mind.

18 Q Then the question to you is, what appeal rights that
19 these individuals have, as far as the administrative
20 process on this determination that you've testified exists,
21 what good is it for them if you've already made the
22 decision when Mr. Bunn there -- that your position is the
23 same?

24 A I am not the person who would hear the appeal. That
25 would be the board of trustees.

1 Q With respect to the board of trustees, are they
2 separate from the union?

3 A As I mentioned before, half of those trustees are from
4 the union side, labor. The other half are contractor
5 trustees.

6 Q So, when an audit is done, it's not done under the
7 auspices of the operating engineer logo. It's done under
8 the auspices of the trustees and the funds. Correct?

9 A The fringe benefit programs.

10 Q So, when an auditor goes out to audit a company, he
11 doesn't work for the union at the direction of the union,
12 correct?

13 A No, he does not.

14 Q So, when a union is involved in this, they don't
15 follow the directions of whatever the union tells them;
16 they follow whatever the directions are of the fund?

17 A Yes.

18 Q Can you explain to me, then, in this case why the
19 local business agent of District 6 instructed your auditor
20 to change his audit report?

21 A I cannot say that that happened. I think we did a
22 re-audit.

23 Q At whose instructions?

24 A I would have to check our files.

25 Q I happen to have those. Just a second.

1 MR. CLARK: Your Honor, I'm going to object to this
2 line of questioning. It's beyond the scope of direct.

3 THE COURT: Your objection is noted, but overruled.

4 MR. MASON: Approach the witness, Your Honor?

5 THE COURT: Yes, you may.

6 MR. MASON: I am handing the witness documents that
7 have been previously marked, identified and in evidence, LL
8 and KK.

9 MR. CLARK: I have a question on the exhibit. You
10 indicate you believe this is already in evidence?

11 MR. MASON: Yes.

12 MR. CLARK: I see it's been filed. I don't know
13 whether it was previously marked.

14 MR. MASON: It was attached to the complaint that we
15 stipulated.

16 MR. TULENCIK: It was attached to their response in
17 opposition to TRO.

18 MR. MASON: It's your document that you attached.

19 MR. CLARK: We're not going to dispute authenticity.
20 I don't think everything that's been filed in the case is
21 in evidence.

22 THE COURT: That's true.

23 MR. CLARK: I wanted to be clear what's in evidence.

24 THE COURT: This is not yet in evidence. It was
25 filed, but it's not in evidence in this hearing.

1 Mr. Mason had moved at the beginning of the hearing
2 for everything that was attached to the various pleadings
3 to be a part of the evidence in this case. But because you
4 weren't aware of what -- Mr. Clark, you knew all of the
5 pleadings that had been filed. I think your response to
6 Mr. Mason was that you were not aware at that moment of
7 everything that would be included in that broader sweep,
8 and so you did not agree to it.

9 No one has moved anything into evidence yet, I don't
10 believe. I was assuming that everyone was going to move it
11 in at the end of the case.

12 MR. MASON: Actually, Your Honor, I believe that
13 counsel reviewed all the documents. You might remember he
14 flipped through it and said these look like ours, and he
15 did agree to a stipulation that all of the documents would
16 be admitted into evidence. You will have to look back at
17 the record itself, but I believe we have that as a
18 stipulation at the beginning.

19 MR. CLARK: I believe what I stated was that we were
20 not going to dispute the authenticity of our own documents,
21 and that --

22 MR. MASON: I think the record will speak for
23 itself.

24 MR. CLARK: Nor do we dispute the authenticity of
25 this document. We just want some clarity as to what is in

1 evidence and what is not.

2 THE COURT: All right. Please proceed, Mr. Mason.

3 BY MR. MASON:

4 Q If you would, please, turn your attention to the
5 Exhibit KK. Who is the auditor here that did this report?

6 A Douglas Baker.

7 Q How long has Mr. Baker worked for the fund?

8 A I'm sorry. How long?

9 Q How long has he worked for the fund?

10 A I don't know exactly. I would probably guess eight or
11 nine years.

12 Q Is he an experienced auditor?

13 A Yes, he is.

14 Q He knows the procedures?

15 A Yes.

16 Q He follows the procedures, to your knowledge?

17 A Yes.

18 Q In this audit, then, on this first one, he in fact
19 noted that there was a finding regarding the hours worked,
20 right?

21 A Yes.

22 Q He also noted, did he not, on page two that there were
23 certain hours that were not picked up in the audit?

24 A Hours that were not picked up?

25 Q Yes, ma'am. If you will look on page two about

1 two-thirds of the way down where it says, "These hours were
2 not picked up in the audit." Do you see that notation,
3 indention, about two-thirds of the way down as a lead
4 sentence?

5 A I'm with you now.

6 Q And you see where it says service rate at 16 an hour?

7 A Yes.

8 Q And then, "This notation is different than the hourly
9 description of the operating hours"?

10 A Uh-huh.

11 Q And "The pay rate was not close to an operator"?

12 A Yes.

13 Q And that there weren't any payroll records describing
14 the duties that these hours performed, correct?

15 A Yes.

16 Q And so he did not count these hours that were worked
17 by Mr. Newlon as operator hours and, therefore, he did not
18 add fringe numbers to those hours, correct?

19 A Yes.

20 Q Now, let's look to the next revised audit. Turn to
21 page two. Now, this is the revised audit that finds a much
22 larger number, correct?

23 A Yes.

24 Q On page two, do you see where it says "These hours
25 were picked up in the audit"?

1 A Yes.

2 Q Do you see that line?

3 A I do.

4 Q Do you see at the request of District 6, J. Lucas?

5 Who is J. Lucas of District 6?

6 A Joseph Lucas.

7 Q Who is he?

8 A I believe he is the field representative for District
9 6.

10 Q And what is District 6?

11 A It's one of the districts that comprises Local 18.

12 Q So he is a business representative for Local 18?

13 A Yes.

14 Q And he is telling the auditor what the auditor is to
15 pick up and put in hours?

16 A He must have contacted our office and --

17 Q Now you don't know that, do you?

18 A I don't know it, no.

19 Q Thank you. The notations made by your auditor, who
20 has been working for you for eight years, was that he did
21 this not at the request of the fund but at the request of
22 Mr. Lucas, correct?

23 A Our office would have reassigned this to him.

24 Q Did the notation reflect that he did it at the request
25 of Mr. Lucas?

1 A I don't have the audit assignment that was given to
2 the auditor so I cannot answer that question.

3 Q Are you arguing with the document that he wrote?

4 A No. I am indicating that our office would give the
5 auditor an audit assignment that would explain what he is
6 to do, and that is not included here.

7 MR. MASON: I have no further questions.

8 THE COURT: Thank you.

9 Mr. Clark, do you have any redirect?

10 MR. CLARK: I do not, Your Honor.

11 THE COURT: Ms. Wilson, thank you very much, ma'am.
12 You may be excused.

13 THE WITNESS: Thank you.

14 THE COURT: One thing, Ms. Wilson. What did you
15 indicate your position is at operating engineers?

16 THE WITNESS: Assistant administrator.

17 THE COURT: Thank you, ma'am.

18 MR. CLARK: Your Honor, we have no additional
19 witnesses at this time. I move for the admission of
20 Defendant's Exhibits 1 through 6.

21 THE COURT: Any objection?

22 MR. MASON: I do have objections to Defendant's
23 Exhibits 2, 3, and 4 on the basis of the testimony of the
24 witness which clearly indicated that these documents were
25 not accurate and that --

1 THE COURT: In what way were the documents not
2 accurate, Mr. Mason?

3 MR. MASON: She was saying when she was
4 cross-examined that the audit department was taking care of
5 and handled all of the issues involved with respect to the
6 disputed funds from Local 18. And these documents, Your
7 Honor, simply do not reflect the hours that are total that
8 these individuals actually worked and were credited, and
9 are actually misrepresenting the facts here.

10 THE COURT: Doesn't that go to weight, though, and
11 not to admissibility?

12 MR. MASON: The Court's free to obviously enter --
13 it would certainly be over our objection.

14 THE COURT: I understand that. But as a matter of
15 law -- your argument is that the document is inconsistent
16 with the testimony. That's the sum and substance of your
17 argument. The argument is not that the document is not
18 what it purports to be, that it has been altered, that it's
19 somehow not authentic. It's that the document conflicts
20 with the testimony. Isn't that your argument?

21 MR. MASON: To a certain extent.

22 THE COURT: So why does that not go to weight, the
23 weight that the Court should give the document, as opposed
24 to the admissibility of it? The document --

25 MR. MASON: The document purports to be the totality

1 of the hours that these gentlemen worked and what they're
2 entitled to, as far as the payments of their health
3 insurance or not, without counting those other hours and,
4 therefore, they misrepresent the actual facts.

5 THE COURT: Where did the actual facts come from,
6 Mr. Mason?

7 MR. MASON: By the testimony of the individuals.

8 THE COURT: Isn't that what I just kind of said?

9 MR. MASON: Yes.

10 THE COURT: I think the short answer is yes.

11 So I'm not saying that the documents themselves are
12 dispositive. I'm simply saying that the documents conflict
13 with the testimony. And what if I disbelieve the testimony
14 but chose to believe the documents? What you're asking me
15 to do is believe the testimony, not to believe the
16 documents; and because the documents don't comport with the
17 testimony, exclude the documents as opposed to weighing
18 evidence which is conflicting and determining that the
19 testimony should take precedence over the documents
20 themselves.

21 Did I miss the essence of your argument?

22 MR. MASON: No, sir.

23 THE COURT: Your objection is noted but it will be
24 overruled. The documents will come in. I'm not saying the
25 amount of weight that I will give the documents in light of

1 the testimony to which you just referred. Defendant's
2 Exhibits 1 through 6 will be admitted.

3 MR. CLARK: With that, the defense rests.

4 THE COURT: Mr. Mason, do you have any rebuttal?

5 MR. MASON: I do have a little bit of rebuttal, but
6 I would like to have a short break to look with the court
7 reporter with respect to what the parties agreed to at the
8 beginning of the hearing on the documents, that I seem to
9 have a different recollection as to what we agreed to at
10 the beginning of the hearing, as opposed to what counsel on
11 the other side has a recollection.

12 THE COURT: We might be able to short circuit that.
13 Are there certain documents that you want to offer,
14 because --

15 MR. MASON: We already have a verified complaint
16 with the documents attached, and counsel has attached with
17 their brief documents. We would just like to have all of
18 those documents admitted for this Court to consider if it
19 wants to have us brief the case, that we could make
20 reference to it as exhibits in this hearing.

21 THE COURT: All right. Mr. Mason, I'm going to
22 invoke the dog-bite rule here. Do you remember the
23 dog-bite rule from torts?

24 MR. MASON: The what rule?

25 THE COURT: The dog-bite rule.

1 Here's how it works. This is my recollection of
2 first-year torts and the dog-bite rule. The keeper of a
3 dog is not liable for the first bite because the keeper
4 would argue that he was unaware of the dog's violent
5 propensities, and so the first bite was gratis, almost.

6 But the keeper of the dog would be liable for
7 subsequent bites because he was now on notice as to the
8 dog's violent propensities; so liability could be
9 attributed to the keeper of the dog. Do you remember that?

10 MR. MASON: Yes, sir.

11 THE COURT: Mr. Clark, do you remember the dog-bite
12 rule?

13 MR. CLARK: I believe there was a wolf in the case,
14 but, yes.

15 THE COURT: Mr. Clark remembers the dog-bite rule,
16 and I'm going to tell you why. I have indicated
17 repeatedly, as has Mrs. Evans, that you have to stand when
18 you are addressing the Court. But you explained to me your
19 theory on these evidentiary matters while seated. When I
20 asked Mr. Clark if he understood the dog-bite rule, what
21 did Mr. Clark do? He stood and answered the question.

22 So we'll keep that first statement that you made
23 about the documents, and we'll let that slide because of
24 the dog-bite rule. But in the future, we can't hear you,
25 Mr. Mason. Mrs. Evans can't hear you because we have that

1 fan that's going there. And besides that, the ghost of
2 Judge Kinneary would never let me sleep if he knew I
3 allowed a lawyer to address the Court while seated, which
4 is totally incongruous with the rules for the Southern
5 District of Ohio located in Columbus.

6 Now, what did you want to tell the Court further?

7 MR. MASON: At this point, Your Honor, we would like
8 to have all of the documents that were attached to the
9 complaint, and all of the documents that the defendants
10 have attached to theirs, admitted into evidence so that the
11 Court can hear and review the entire record that it has
12 before it in order to make any determinations it chooses to
13 make in this matter.

14 THE COURT: All right. I think that what I was
15 saying was there may be documents that you want to admit
16 that were attached to the pleadings that weren't covered by
17 the testimony, that are not germane to this particular
18 proceeding, this PI hearing. I don't know whether there
19 would be any documents that fall in that category.

20 But before we have Mrs. Evans go all the way back
21 to, you know, like a 30-second colloquy at the beginning of
22 yesterday's proceeding, maybe you and Mr. Clark can get
23 together for about five or ten minutes, go over the
24 documents that you believe should come into evidence in
25 this PI hearing, and that might obviate the need and might

1 make for a more efficient process. Because either way,
2 Mr. Clark took the position that "I'm not objecting to
3 authenticity." He still has the right to object to the
4 foundation. Maybe you didn't establish the foundation.
5 Maybe it's not relevant to the issues that were raised in
6 this particular hearing. Maybe there are some issues that
7 were raised by the pleadings that were issues reserved for
8 the trial on the merits, because there was no motion made
9 by either party at the beginning of yesterday's hearing, at
10 least that I recall, that asked for there to be a merger of
11 the PI hearing with a trial on the merits.

12 So you're painting with a broad brush when you ask
13 that all of the documents come in when all of them may not
14 be relevant, the foundation may not have been adequately
15 laid for all of them, et cetera. So go over that with
16 Mr. Clark first, and then you can narrow your focus.
17 There's no need to argue about the documents to which no
18 objection is being made, only those documents to which an
19 objection is being made.

20 So that's how we're going to do it. It's a quarter
21 to nine now. We'll stand in recess until -- how much time
22 do you think you will need to go over the documents,
23 Mr. Mason?

24 MR. MASON: I don't know. There's at least, if
25 we're dealing with the documents that they submitted --

1 THE COURT: No need to deal with the documents --
2 you're not talking about the documents that they moved into
3 evidence?

4 MR. MASON: No, sir. We're talking about the
5 documents that were part of the briefs that they submitted
6 on these issues.

7 THE COURT: We're going to stand in recess until
8 nine o'clock because I have a criminal calendar that starts
9 at 9:30. You said you have a brief rebuttal case?

10 MR. MASON: Just three witnesses with just a few
11 questions for each one.

12 THE COURT: Well, then, what we're going to do is
13 we're going to do that right now, then we can deal with the
14 documents later. I just don't want this to run into my
15 calendar.

16 MR. MASON: Okay. Then we'll call Mr. Morgan to the
17 stand first.

18 THE COURT: Mr. Morgan, please come back to the
19 stand. You're still under oath.

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MARK MORGAN

Called as a witness on behalf of the Plaintiff, on
rebuttal, being previously duly sworn, testified as
follows:

DIRECT EXAMINATION

BY MR. MASON:

Q Mr. Morgan, did you hear the testimony of Ms. Glenn
with respect to your insurance and qualifications?

A I did.

Q Were her statements true with respect to insurance if
your Local 18 hours had been credited?

A Not based on the conversation I had with Local 18.

MR. CLARK: Your Honor, I object to the form of that
question.

THE COURT: To the form of the question?

Would you read the question back, Mrs. Evans.

(Thereupon, the last question was read by the court
reporter.)

MR. CLARK: I'm not clear to what testimony the
question is referring to.

THE COURT: I was researching my mental files for
that same answer. I'm going to sustain the objection
because of the broad nature of the question. It could
invite a narrative response. So could you be more

1 specific, Mr. Mason?

2 BY MR. MASON:

3 Q Do you recall Ms. Glenn testifying that you would not
4 be qualified for health insurance if the hours that you had
5 for Local 18 had actually been credited to your account?

6 A Run that by me one more time, please.

7 Q Do you recall Ms. Glenn testifying with respect to
8 your hours for Local 18 and whether or not, if they had
9 been credited, you would still not be entitled to health
10 insurance?

11 A I do recall that testimony, yes.

12 Q Was that testimony true?

13 A It was not.

14 Q Why was it not true?

15 A Based on my conversation with Local 18, when I had
16 called about questioning if my hours had transferred over
17 and whether or not the hours that were removed from me,
18 they had told me -- because I had the doctor's appointment
19 coming up -- told me if they had not taken those hours, I
20 would have health insurance.

21 MR. MASON: I have no further questions for this
22 witness.

23 THE COURT: Thank you, Mr. Mason.

24 Mr. Clark, cross?

25

- - -

CROSS-EXAMINATION

BY MR. CLARK:

Q Mr. Morgan, you don't know who you spoke to at the fringe office?

A I don't remember a name. Karen sticks out in my mind, but I don't honestly remember who it was I spoke with.

Q You also heard Ms. Glenn testify that she's the individual at the fund office charged with determining eligibility?

A Right.

Q Did you speak with Ms. Glenn when you called the fringe office?

A Again, I couldn't tell you who I spoke with. The name Karen sticks out in my mind but I don't a hundred percent remember.

Q Do you believe you ever spoke to Ms. Glenn?

A I do not.

Q Have you reviewed the eligibility provisions of the plan document to determine for yourself whether or not you believe you would be eligible for benefits if your hours from Bunn were included?

A Are you asking me if I looked through the plan summary?

Q Have you looked at the eligibility portion of the

1 plan?

2 A Is that in the plan summary?

3 Q Have you reviewed the eligibility portion of the plan
4 to determine whether or not you would be eligible for
5 benefits if the Bunn hours were included?

6 A Is it in the book that describes everything, that has
7 all our rules of regulations?

8 Q I'm asking questions of you, not the other way around.

9 A I'm trying to understand your question.

10 Q My question is, have you reviewed the eligibility
11 portion of the health and welfare fund plan to determine
12 whether or not you would be eligible for benefits if the
13 hours -- all of your hours for Bunn Enterprises were
14 included?

15 A I have looked through the plan book, and to the best
16 of my knowledge, I read through it several times. I don't
17 know it inside and out. I've glanced at sections that I
18 thought would best apply to me, is the best answer I can
19 give you.

20 Q So you haven't looked at the eligibility provisions?

21 A Is it in the book? I can't tell you if I specifically
22 looked at it. I've glanced through it and read certain
23 section. I don't have it memorized. I'm not sure what
24 you're asking of me.

25 Q You testified that you would be eligible for benefits

1 if those hours were included?

2 A Based on what I was told by the person I spoke with at
3 the benefits.

4 Q But you have no personal knowledge of the eligibility
5 provisions of the plan?

6 A I have some knowledge of it. I have an idea of what
7 hours were required. I can't recite it back. I haven't
8 done it for nine years. But I have an idea of where I need
9 to be, the time frames versus the hours and so on and so
10 forth.

11 Q How many hours do you believe you're entitled to
12 credit for that you haven't been credited for?

13 A The number I remember speaking with them was
14 approximately 280, 285, somewhere in that ballpark.

15 Q But you have not reviewed the eligibility portion to
16 calculate an additional 285 hours?

17 A No, I have not, I guess.

18 Q The only indication you have that -- the only reason
19 you're testifying today that you think you would be
20 eligible for additional benefits under the health and
21 welfare fund is because you spoke with someone you think
22 might be named Karen?

23 A If you have a question about your benefits or funds or
24 retirement, wouldn't you call the benefits office and ask
25 them? Isn't that what you guys are there for, to stand

1 behind your members, say this is where you're at, these are
2 the hours you have, not take them away from you after
3 you've worked X number of hours and hand them to somebody
4 else?

5 MR. CLARK: I have no further questions.

6 THE COURT: Mr. Mason, I take it you have nothing
7 further.

8 MR. MASON: No further questions for this witness.

9 THE COURT: Mr. Morgan, thank you very much, sir.
10 You may be excused.

11 MR. MASON: Danny Lantz.

12 THE COURT: Mr. Lantz, please come forward.

13 Mr. Lantz, you're still under oath.

14 - - -

15 DANNY LANTZ

16 Called as a witness on behalf of the Plaintiff, in
17 rebuttal, being previously duly sworn, testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. MASON:

21 Q Mr. Lantz, were you in the room yesterday when
22 Ms. Glenn testified with respect to the hours that should
23 be credited to your account?

24 A Yes.

25 Q Do you recall her testimony regarding the fact that

1 even if your hours with Local 18 had been counted that you
2 would not have insurance through June of 2013?

3 A Yes.

4 Q To your knowledge, was that statement true?

5 A No.

6 Q How do you know that?

7 A If I had the hours that was due me, I would have had
8 insurance for -- I knew how many hours, you know, roughly
9 that we needed to have. I called the fringe benefits,
10 talked to them up there, and she told me that I would have
11 enough hours if they was credited, but they was frozen and
12 they wouldn't be credited. And when they was credited,
13 they would reimburse me.

14 Q And if you had the hours that was properly credited,
15 how far -- how long would your health insurance have gone
16 through till, according to what she told you?

17 A The fringe benefit office told me till July of '13,
18 2013.

19 MR. MASON: Thank you. No further questions, Your
20 Honor.

21 THE COURT: Mr. Clark, cross?

22 - - -

23 CROSS-EXAMINATION

24 BY MR. CLARK:

25 Q Mr. Lantz, who did you speak to at the fringe benefit

1 office?

2 A Whoever was answering the phone. I didn't get her
3 name. She's supposed to be working for us. I shouldn't
4 have to get her name. She shouldn't be lying to me.

5 Q And you don't know when you spoke to her?

6 A Yes.

7 Q When was it?

8 A It was the seventh month, right around the 15th when I
9 got the letter. I called the company that I work for. I
10 thought that was the problem. She told me that all the
11 hours was turned in. I called the fringe benefits office
12 immediately when I got the letter, and she told me that I
13 was eligible but our funds was froze until the audit was
14 completed.

15 Q So I think the seventh month, then, July of 2012?

16 A Yes.

17 Q Have you had any subsequent conversations with anyone
18 at the fringe office regarding your eligibility?

19 A No.

20 Q Since your conversation in July of 2012 with someone
21 at the fringe office, have you reviewed the eligibility
22 portions of the plan?

23 A No.

24 Q Have you reviewed the hours credited to you in the
25 quarterly reports you received?

1 A Yes.

2 Q Have you -- I guess you haven't looked at the
3 eligibility portion.

4 MR. CLARK: I don't have any additional questions.

5 MR. MASON: No further questions, Your Honor.

6 THE COURT: Thank you very much, Mr. Lantz. You may
7 be excused.

8 MR. MASON: We'll call Mr. Schau.

9 THE COURT: Mr. Schau, please come forward. You're
10 still under oath.

11 - - -

12 MICHAEL SCHAU

13 Called as a witness on behalf of the Plaintiff, in
14 rebuttal, being previously duly sworn, testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. MASON:

18 Q Mr. Schau, do you recall the testimony of Ms. Glenn
19 yesterday regarding your health insurance credit hours for
20 Local 18?

21 A Yes.

22 Q With respect to that, can you tell me whether or not
23 you contacted every local that you worked for to have your
24 hours transferred to your current local?

25 A Yes, I did.

1 Q Did those contacts also include Local 18?

2 A Yes.

3 Q To your knowledge, did you fill out whatever paperwork
4 every local required of you to transfer those hours to your
5 new local in Kentucky?

6 A Yes.

7 Q With respect to that, have the hours from Local 18
8 been transferred to your new local in Kentucky?

9 A No, they haven't.

10 MR. MASON: No further questions.

11 - - -

12 CROSS-EXAMINATION

13 BY MR. CLARK:

14 Q Mr. Schau, are you changing your testimony of
15 yesterday that you did not fill out a transfer of hours
16 authorization form?

17 A No.

18 Q You did not fill out such a form?

19 A I'm not changing my testimony.

20 Q I believe your testimony was that you did not fill out
21 an authorization form for Local 18 to transfer your hours.
22 Is that true?

23 A I may have; I may haven't. I'm not really sure.

24 Q Well, you don't have such a form to produce today, do
25 you?

1 A No.

2 MR. CLARK: Nothing further.

3 MR. MASON: Just a couple of quick questions.

4 THE COURT: All right.

5 - - -

6 REDIRECT EXAMINATION

7 BY MR. MASON:

8 Q Do you have copies of any of the forms that you
9 submitted to any of the locals with respect to transferring
10 any of your hours to your current local?

11 A No, I don't.

12 MR. MASON: No further questions.

13 THE COURT: Mr. Schau, thank you very much, sir.
14 You may be excused.

15 Any more witnesses, Mr. Mason?

16 MR. MASON: No other witnesses. We do have exhibits
17 LL and KK that were identified. We'd like to move those
18 into evidence.

19 THE COURT: Any objection, Mr. Clark?

20 MR. CLARK: No objection, Your Honor.

21 THE COURT: LL and KK will be received.

22 Now, it's a couple of minutes till nine. I'll give
23 you until 9:10. Will that give you enough time to --

24 MR. MASON: I'll certainly confer with him. We'll
25 see if we can get it done.

1 THE COURT: I wanted to just save some time for you
2 to make your arguments as well, in the event there are
3 objections.

4 (Recess taken from 8:58 a.m. to 9:15 a.m.)

5 THE COURT: Mr. Mason, are there any exhibits to
6 which there are objections that the plaintiff wishes to
7 offer into evidence?

8 MR. MASON: No, Your Honor. We've got an agreement
9 with respect to the documents between us and counsel that
10 we feel is what's proper before this Court for this
11 hearing.

12 THE COURT: And what's your position? Which
13 documents are they?

14 MR. MASON: We have them here. We'll --

15 THE COURT: Well, I'll tell you what, maybe the
16 easiest way to do it would be to -- since the defense
17 numbered its exhibits, you can letter yours. So they will
18 be Plaintiff's Exhibits A through what?

19 MR. MASON: Well, I have them with some specific
20 numbers on them, and I can just give you -- or letters.
21 I'm sorry.

22 It would be Exhibit A, F --

23 THE COURT: What is A?

24 MR. MASON: "A" would be the Ohio Highway Heavy
25 Agreement from 2010 through 2013.

1 Exhibit F, which is the Ohio Operating Engineers
2 determination of their audit on the first audit dated
3 January 19 of 2012.

4 THE COURT: All right.

5 MR. MASON: Exhibit G, which is the second audit
6 dated March 9 of 2012.

7 THE COURT: Okay.

8 MR. MASON: And that's it.

9 THE COURT: All right. No objection to those,
10 Mr. Clark?

11 MR. CLARK: No objections, Your Honor.

12 THE COURT: Those exhibits will be admitted.

13 Is there anything else from the plaintiff?

14 MR. MASON: No, sir.

15 THE COURT: Anything further from the defense?

16 MR. CLARK: No, Your Honor.

17 THE COURT: I will take this matter under
18 advisement, obviously. I will issue an opinion forthwith.
19 During the pendency of the Court's deliberations, the TRO
20 remains in place. I will try to get this out within the
21 next week, and further briefing will not be necessary.

22 Thank you very much, everyone.

23 (Proceedings concluded at 9:17 a.m.)

24 - - -

25

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans
Shawna J. Evans, RMR
Official Federal Court Reporter